

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Petition of NextG Networks of)	
California, Inc. for a Declaratory)	
Ruling that its Service is Not Commercial)	WT Docket No. 12-37
Mobile Radio Service)	

COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

Michael Bernard, City Attorney
Gabriel Garcia, Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
City of San Antonio
City Hall
100 S. Flores Street
San Antonio, Texas 78205
(210) 207-4004

Tillman L. Lay
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Avenue, NW
2nd Floor
Washington, DC 20036
(202) 879-4000

*Counsel for
City of San Antonio, Texas*

April 2, 2012

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY	1
I. THERE ARE FACTUAL AMBIGUITIES AND DISCREPANCIES IN NEXTG’S CHARACTERIZATIONS OF ITS SERVICES.....	3
II. WHETHER OR NOT NEXTG IS PROVIDING COMMERCIAL MOBILE RADIO SERVICE IS LESS CLEAR THAN NEXTG CLAIMS.	6
A. The Antennas at NextG’s Nodes Provide “Radio Communication”	7
B. Parts of NextG’s Services Appear To Be Carried on Between Land and Mobile Stations	7
CONCLUSION.....	9

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Petition of NextG Networks of)	
California, Inc. for a Declaratory)	
Ruling that its Service is Not Commercial)	WT Docket No. 12-37
Mobile Radio Service)	

COMMENTS OF THE CITY OF SAN ANTONIO, TEXAS

The City of San Antonio, Texas (“City” or “San Antonio”), files these comments in response to the Commission’s February 16, 2012, Public Notice¹ seeking comment on the Petition for Declaratory Ruling (“Petition”) filed by NextG Networks of California, Inc. (“NextG”), seeking a ruling that its distributed antenna system (“DAS”) service and other “small-cell solutions” services are not “commercial mobile radio service” (“CMRS”) under Section 20.3 of the Commission’s rules, 47 CFR § 20.3.²

INTRODUCTION AND SUMMARY

San Antonio files these comments to caution the Commission that the facts surrounding, and thus the proper categorization of, the various services that NextG collectively defines as “NextG Service”—“the telecommunications service that NextG offers and provides via DAS networks and other ‘Small-cell Solutions,’” (Petition at 1)—are not nearly as simple or absolute as NextG claims. San Antonio does not dispute that landline backhaul service provided to

¹ Wireless Telecommunications Bureau Seeks Comment on Petition for Declaratory Ruling Interpreting the Definition of “Commercial Mobile Radio Service” as Applied to NextG Networks of California, Inc.’s Distributed Antenna Systems and Other “Small-Cell” Solutions, *Public Notice*, WT Docket No. 12-37, DA 12-202 (rel. Feb. 16, 2012) (“Public Notice”).

² Petition for Declaratory Ruling, Petition of NextG Networks of California, Inc. for a Declaratory Ruling that its Service is Not Commercial Mobile Radio Service (filed Dec. 21, 2011) (“Petition”).

wireless carriers is not itself a commercial mobile radio service (“CMRS”) under the Communications Act and FCC rules. But based on NextG’s own statements and representations to the FCC and elsewhere, its DAS service and other “small-cell solutions” services are *not* limited to fiber or other landline-based—or even wireless-based—backhaul service provided to wireless carriers. To the contrary, and like all DAS services generally, some of NextG services (how much is unclear) entail NextG’s ownership, operation and management of “nodes,” which in turn include antennas that emit and receive RF signals to and from NextG’s carrier-customer’s end-use subscribers. Indeed, it is the ability of DAS networks—through the addition of small antennas and cells—to extend the wireless transmitting and receiving reach, or expand the available spectrum capacity, of wireless networks, *not* merely their backhaul capacities, that makes DAS networks and other “small-cell solution” services so attractive not only to wireless carriers, but to NextG’s other customers as well. (NextG has non-wireless carrier customers, although you’d be hard-pressed to tell that from its Petition.)

The point is that, based on the ambiguous statements made in NextG’s Petition, coupled with the apparent discrepancies between those statements and NextG’s other representations in other filings concerning “NextG’s Service,” the Commission cannot grant NextG’s Petition, at least not in the blanket, unconditional form that NextG requests. At a minimum, the Commission would need more facts about the nature of each and every service and facility that falls within NextG’s vaguely and broadly-defined “NextG Service” category. Moreover, any Commission ruling would have to be explicitly conditioned on the accuracy and applicability of those facts to the particular service or collection of services which NextG provides in a particular

location. Alternatively, the Commission should deny NextG’s Petition for failing to present sufficient evidence about the relevant traits of “NextG Service” to make the requested ruling.³

I. THERE ARE FACTUAL AMBIGUITIES AND DISCREPANCIES IN NEXTG’S CHARACTERIZATIONS OF ITS SERVICES.

NextG’s Petition rests on an “either/or” premise—that its DAS and “small-cell solution” services must either be landline broadband “wired communications” or wireless “radio communications.”⁴ NextG then proceeds to argue that “NextG Service” is the former—“primarily” fiber backhaul services—so it therefore must not be the latter.⁵ NextG, however, overlooks a third possibility: that it offers different combinations of services to different customers, and some of these services have landline elements, while others have wireless elements.

In fact, when NextG’s prior representations and statements made to the Commission outside of the Petition are read together with the Petition, it seems undeniable that NextG’s services—at least its “DAS configuration” (Petition at 2)—include both landline and wireless elements. Thus, the Petition (at 2-3) describes the “Nodes” in NextG’s DAS offerings, stating that each of those Nodes “includes a small, low-power antenna.” Moreover, these “small, low-power antenna[s]” do in fact appear to send and receive wireless RF transmissions to and from NextG’s wireless customers’ subscribers. *See id.*; Cutrer Decl. at ¶¶ 7-9.⁶

NextG’s description of its DAS service raises a few obvious questions which its Petition never clearly answers. Which party—NextG or its wireless carrier customer—installs, owns,

³ *See Petition for Declaratory Ruling to Clarify Provisions of Section 332(c)(7)(B) to Ensure Timely Siting Review and to Preempt Under Section 253 State and Local Ordinances that Clarify All Wireless Siting Proposals as Requiring a Variance*, 24 FCC Rcd 13994, 14020 (¶67) (2009) (request for declaratory relief covering variance requirement denied due to lack of sufficient evidence).

⁴ Petition at 1-2

⁵ *Id.* at 2-15.

⁶ Declaration of David Cutrer, Exh. 3 to the Petition (“Cutrer Decl.”).

and/or manages the Nodes? Are the transmitting and receiving antennas located at each of those Nodes installed, owned and/or managed by NextG, or by its wireless carrier customer?

Based at least on its statements elsewhere, it appears that NextG -- not its wireless carrier customer -- installs, owns, manages and operates both the Nodes and the small antennas at those Nodes. In its September 30, 2011, reply comments filed in WC Docket No. 11-59, for instance, NextG stated that “its [DAS] networks incorporate *both wireline and wireless equipment*.”⁷ It also referred to “NextG’s installation of wireless antennas in the PROW,”⁸ and stated that “the antennas involved emit radio frequencies (‘RF’),” and that those antennas are in fact “*NextG’s antennas*.”⁹

Similarly, the December 23, 2011, Joint Application of NextG and Crown Castle Solutions Corp. for consent to the transfer of control of NextG to Crown Castle describes NextG’s DAS as “*a network of antennas and repeaters* connected by fiber to a communications hub,” and further states that NextG “has over 7,000 nodes *on-air* and approximately 1,500 nodes under construction.”¹⁰

Thus, unless NextG’s filings with the Commission in these other dockets were inaccurate or misleading, it seems reasonably clear that NextG installs, owns and operates the “Nodes” on its DAS networks, including the “small, low-power antennas” at those nodes. In other words, it certainly appears that NextG owns and operates wireless transmitting and receiving equipment at

⁷ Reply Comments of NextG Networks, Inc., *Acceleration of Broadband Deployment*, WC Docket No. 11-59, at 1 (filed Sept. 30, 2011) (emphasis added).

⁸ *Id.* at 9.

⁹ *Id.* at 10 (emphasis added).

¹⁰ Joint Application, *NextG Networks of NY, Inc., et al.*, WC Docket No. 11-209 (filed Dec. 23, 2011) (emphasis added). *Accord*, *Public Notice*, Domestic, Section 214 Application filed for the Transfer of Control of NextG Networks Inc. and its Subsidiaries to Crown Castle Solutions Corp., DA 12-19 (rel. Jan. 6, 2012) (referring to NextG’s “7,000 nodes on-air”).

its “Nodes” that are in wireless communications with the mobile devices of its wireless carrier customers’ subscribers.

To be sure, the Petition also states (at 3 and Cutrer Decl. at ¶8) that “all RF transmissions and wireless services are controlled and provided by NextG’s wireless carrier customers—not NextG—through the carrier customer’s equipment located at the Base Station.” Because NextG has no FCC radio licenses to provide the wireless services that are transmitted from or received at NextG’s small antennas at its DAS or “small cell” nodes, this statement must be true in order for NextG to comply with the Communications Act and FCC rules. “Control” and “provide” are, however, conclusory labels, the accuracy of which depends on underlying facts.

And the facts clearly seem to be that NextG installs, owns and operates the nodes, and it also installs, owns and operates the antennas that are at those nodes. Moreover, NextG’s website indicates that its RF engineers design the DAS network that it provides to its customers,¹¹ and that NextG manages its DAS network and “SCS [small-cell solutions] systems” for its customers, including “send[ing] control signals to the remote SCS system to adjust parameters” and performing all maintenance on NextG’s DAS networks and SCS systems.¹²

Thus, far from being “fundamentally similar to the many forms of [LEC or cable operator-provided] backhaul that support the wireless industry,”¹³ NextG’s DAS and “small cell solution” services operate as a wireless RF-transmitting and receiving *extension* of its customers’ wireless networks. As NextG itself has elsewhere stated, its DAS networks provide not merely fiber backhaul, but wireless transmission and spectrum management services as well:

¹¹ *NextG Networks, Wireless Service Provider—Design and Engineering*, <http://www.nextgnetworks.net/nextg/solutions/wireless-service-provider/design-and-engineering.html> (last visited Mar. 15, 2012).

¹² *NextG Networks, Wireless Service Provider—Operations*, <http://nextgnetworks.net/nextg/solutions/wireless-service-provider/operations.html> (last visited Mar. 15, 2012).

¹³ Petition at 1.

- **Coverage:** DAS architecture provides coverage in areas that cannot be effectively addressed with traditional sites and is a particularly attractive option for deploying in previously hard to reach residential areas.
- **Capacity:** DAS can closely align capacity to actual market requirements, *managing available radio resources*.
- **Spectrum:** DAS *uses available frequency spectrum efficiently* through multiple *low-power transmission points*.
- **Interference:** DAS reduces interference through *low radiation centers* and *lower output power*.
- **Data:** DAS provides better data throughput *given signal strength and proximity of transmission points to user equipment*.
- **Scalability:** DAS is a scalable network that can meet future capacity requirements, or additional carriers, by *adding additional nodes*. DAS can also allow more efficient deployment by *accommodating multiple carriers on the same system*.
- **Adaptability:** DAS is flexible and allows prompt response to market dynamics, equipment architecture changes and new technologies.¹⁴

In short, there is a reason that DAS stands for “distributed *antenna* system,” and that NextG’s “small-cell solutions” are indeed “small-*cell*” solutions: NextG’s services, or at least part of them, involve its deployment, ownership *and* operation of wireless transmitting and receiving antennas that create new small cells for its customers.

II. WHETHER OR NOT NEXTG IS PROVIDING COMMERCIAL MOBILE RADIO SERVICE IS LESS CLEAR THAN NEXTG CLAIMS.

NextG argues at (6-13) that “NextG Service”—again, that troublesomely broad and ill-defined category—is not a “commercial mobile radio service” (“CMRS”) within the meaning of the Act or FCC rules. This is so, according to NextG, because it does not provide “radio communication,” and because “it does not provide service via facilities that are ‘mobile stations.’” *Id.* at 7. The factual accuracy of both of these assertions, however, is open to serious question.

¹⁴ Letter from T. Scott Thompson, counsel for NextG Networks, Inc., to Marlene Dortch, Secretary, FCC, at p. 2 (Mar. 29, 2011), WC Docket No. 07-245, GN Docket 09-51 (emphasis added).

A. The Antennas at NextG’s Nodes Provide “Radio Communication.”

As noted above in Part I, it seems evident that NextG facilities—specifically, its small, low-power antennas at its nodes—do indeed “*transmi[t] [information] by radio*” within the meaning of 47 U.S.C. § 153(33). To be sure, NextG may be transmitting and receiving those signals on the licensed frequencies of, and under the oversight of, its wireless carrier customer. But that does not change the physical reality that NextG is, through its own small, low-power antenna facilities at its nodes, transmitting (and receiving) information by radio.

NextG attempts to divert attention from this fact by referring to the fiber backhaul service that it also provides—a service that it claims is “no different from, and indeed competes directly with, the fiber-based backhaul/private line service provided by [ILECs] and other competitive fiber companies.” Petition at 8. If that were all that NextG provides, this statement would be true. But NextG’s Petition is not limited to such backhaul services. It seeks to sweep into the rubric, “NextG Service,” *all* of its DAS and “small-cell solutions” services—services that go far beyond mere landline backhaul service. The issue is *not*, as NextG claims, whether its landline backhaul service is “incidental to the transmission of radio communications by NextG’s carrier-customers” (*id* at 9). Rather, the issue is whether NextG’s own “radio communications” from and to its own “small antennas” are “incidental to” “the transmission of radio communications by NextG’s carrier-customers.” The answer to that is clearly “yes,” and as a result, the precedent cited by NextG (at 9-11) is inapposite.

B. Parts of NextG’s Services Appear To Be Carried on Between Land and Mobile Stations.

NextG likewise oversimplifies in claiming (at 11-13) that “NextG’s Service” is not “carried on between mobile stations or receivers and land stations, and by mobile stations communicating among themselves.” (Emphasis omitted.) 47 U.S.C. § 153 (27); 47 CFR § 20.3.

NextG concedes (at 11) that its nodes may be “land stations.” But NextG claims it “does not provide service between those land stations and [presumably, its carrier-subscriber customers’] mobile stations or receivers.”

But this raises a question: If NextG’s “small antennas” at its “Nodes” do not transmit and receive radio transmissions to and from the mobile devices of its carrier-customer’s subscribers, how do NextG’s DAS and “small cell solution” services “provide[] coverage . . . in previously hard to reach residential areas,”¹⁵ and how do these NextG services “provide[] better data throughput” by furnishing close “proximity of transmission points to user equipment”?¹⁶ Put a little differently, if NextG’s small, low-power antennas at each of its nodes are not communicating with the receivers of its carrier-customer’s subscribers, what are they doing?

Presumably, NextG’s answer would be that those radio communication are “controlled and provided” by its carrier-customers (Petition at 8), and “NextG does not have any relationship with or provide any service to retail end users of wireless or wireless telecommunications services” (*id.* at 2; Cutrer Decl. at ¶¶ 9, 12). But assuming these statements are accurate,¹⁷ NextG admits that it is a “carrier’s carrier.” Petition at 2. As such, NextG’s provision to its carrier customers, “for profit,” of wireless radio communication between its nodes/antennas and the mobile devices of its wireless carrier customers’ subscribers would seem to fall within the CMRS definition of 47 CFR § 20.3 A “carrier’s carrier” is, after all, by definition a “carrier.”

¹⁵ See text at note 14 *supra*.

¹⁶ *Id.*

¹⁷ Again, the record is equivocal. NextG says that its “typical service” has “two end points: one at the Node and one at the Hub.” Petition at 12 (emphasis added). It also says that its “primary customers” are wireless carriers. *Id.* at 2 (emphasis added). NextG’s website, however, reveals that it also has non-carrier customers, such as universities. See, e.g., *NextG Networks, Universities, Case Study: University of Notre Dame*, <http://www.nextgnetworks.net/nextg/solutions/case-notredame.html> (last visited Mar. 15, 2012). The point is, the FCC cannot make a categorical declaration about “NextG Service” based on NextG’s generalizations about what it “typically” or “primarily” does.

CONCLUSION

The Commission should not grant NextG's Petition, at least not until and unless NextG provides much more information than it currently has about the full nature and scope of the services that it is providing in Arizona. To the extent the Commission is nevertheless inclined to grant the Petition in whole or in part, any grant should be conditioned on the accuracy of, and the scope of its reach confined to, the specific facts about each particular service that NextG provides in Arizona.

Respectfully submitted,

Michael Bernard, City Attorney
Gabriel Garcia, Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
City of San Antonio
City Hall
100 S. Flores Street
San Antonio, Texas 78205
(210) 207-4004

/s/ Tillman L. Lay

Tillman L. Lay
SPIEGEL & MCDIARMID LLP
1333 New Hampshire Avenue, NW
Washington, DC 20036
(202) 879-4000

*Counsel for
City of San Antonio, Texas*

April 2, 2012